

## OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 02-08

September 18, 2002

**TO:** All Regional Directors, Officers-in-Charge, and Resident Officers**FROM:** Arthur F. Rosenfeld, General Counsel**SUBJECT:** Revised Procedure for Merit Dismissals

In GC 95-15, then General Counsel Fred Feinstein announced procedures for a merit dismissal program. Under the program, Regional Directors were authorized to dismiss meritorious unfair labor practice cases on non-effectuation grounds. Specifically, the guidance offered was as follows:

The cases for which such an approach would be appropriate are limited to those minor or technical violations in which there are no prior meritorious unfair labor practice charges within the past several years and in which:

- a.) the conduct is isolated in nature; there is no ongoing unlawful effect on an employee's terms and conditions of employment; and, there is neither impact on other employees nor other accompanying violations which require a Board remedy; or
- b.) the conduct has minor group impact, such as a delay in providing information 8(a)(5) violations where the delay caused no other adverse effect; or
- c.) the conduct is of limited duration, such as an unlawfully promulgated no solicitation rule which was subsequently rescinded.

These dismissals were predicated on no further meritorious unfair labor practices within 6 months. Otherwise the charge would be reinstated.

OM 01-76, issued on July 17, 2001, announced a modified procedure for the issuance of merit dismissals. The modification involved a limitation on the use of language noting that a charge might be subject to reinstatement if the Charged Party was charged with further ULP allegations deemed to have merit within a 6-month period. As stated in OM 01-76, the purpose of this change was to ensure that the language used in merit dismissals conformed to Board law regarding the reinstatement of dismissed charges as stated in *Ducane Heating Corp.*, 273 NLRB 1389 (1985).

While the modification of the merit dismissal procedure announced in OM 01-76 was arguably required by the principles articulated in *Ducane Heating Corp.*, the change also discouraged Regions from issuing merit dismissals. This resulted from the limitation on reinstatement of a charge to within 6 months of the date of the original alleged unlawful conduct, when it was determined that the Charged Party had engaged in additional unfair labor practices subsequent to the issuance of the merit dismissal. Thus, in many cases, by the time a merit dismissal issued, there would be little, if any, of the 6-month period remaining.

After reviewing the subject further, I believe that the disincentive to the use of merit dismissals resulting from OM 01-76 is not beneficial to the Agency or the public. Accordingly, a new procedure for issuing merit dismissals has been developed. This new procedure is designed to enable Regions to rescind a merit dismissal if the Charged Party engages in additional unfair labor practices found to have merit within 6 months of the merit dismissal, while at the same time avoiding the potential barrier to reinstatement posed by *Ducane Heating Corp.*

Under the new procedure, when a Region determines that a merit dismissal is warranted, the Region will issue a letter to the Charging Party (copied to the Charged Party) stating that the charge will be held in abeyance for 6 months from the date of the letter. The letter will note that the charge is being held in abeyance because, while merit has been found to the allegation, a

determination has been made that it would not effectuate the purposes of the Act to proceed on the case at this time. The letter will further state that if, within a 6-month period, the Charged Party is not alleged in a new meritorious charge to have engaged in additional unfair labor practices, the Region would then issue a second letter dismissing the charge. The Charging Party shall have the right to appeal both the initial letter announcing the decision to hold the charge in abeyance and any subsequent letter announcing the final dismissal of the charge. This dual appeal right is comparable to that of a charge deferred pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971).

Enclosed with this memorandum is sample language that Regions may utilize when issuing the initial letter announcing a merit dismissal decision and a present determination *not* to proceed.

If you have any questions about this memorandum, please contact your Assistant General Counsel or Deputy.

/s/  
A.F.R.

Enclosure

cc: NLRBU  
RELEASE TO THE PUBLIC

MEMORANDUM GC 02-08

[Charging Party]

Re:[Case Name]  
[Case Number]

Appropriate Salutation:

The Region has carefully investigated and considered your charge against \_\_\_\_\_ alleging violations under Section 8 of the National Labor Relations Act.

*Conditional Decision to Dismiss:* Based on that investigation, I have concluded that further proceedings would not effectuate the purposes and policies of the Act and will dismiss your charge six months from this date unless a new meritorious charge is filed within that time alleging that the Charged Party has engaged in other unfair labor practices that render the instant disposition inappropriate. Accordingly, I will hold your charge in abeyance for six months from the date of this letter. If a meritorious charge involving other unfair labor practices is filed against the Charged Party during that period, I will reconsider whether further proceedings on this charge are warranted. My reasons for conditionally deciding to dismiss this charge are as follows.

Your charge alleges(, among other things,) that [Briefly describe closely related allegations and reasons for decision in the same paragraph.]

Your charge also alleges that. . . .

Finally, your charge alleges that. . . .

*Your Right to Appeal:* The National Labor Relations Board Rules and Regulations permit you to obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board. If you wish to file an appeal, your attention is directed to the following:

**Appeal Due Date:** The appeal **must** be received by the General Counsel in Washington, D.C. by the close of business at 5:00 p.m. [EST or EDT, as appropriate] on [14 days from issuance]. However, if you mail the appeal, it will be considered timely if it is postmarked no later than one day before the due date. The appeal MAY NOT be filed by facsimile transmission.

**Extension of Time to File Appeal:** Upon good cause shown, the General Counsel may grant you an extension of time to file the appeal. You may file a request for an extension of time by mail, by facsimile transmission or through the Internet. The fax number is (202) 273-4283. Any request for an extension of time **must** be received no later than the appeal due date indicated above. Unless filed through the Internet, a copy of any request for extension of time should be sent to me. (Special Instructions for requesting an extension of time over the Internet are set forth in the attached Access Code Certificate.)

**Appeal Contents:** This appeal must contain a complete statement setting forth the facts and the reasons why you want to appeal the conditional decision to dismiss your charge.

**Address for Appeal:** The appeal should be sent to the General Counsel of the National Labor Relations Board, Office of Appeals, 1099 14th Street, N.W., Washington, D.C. 20570. You should send a copy of the appeal to me. At the time you send the appeal to the General Counsel, please complete the enclosed Notice of Appeal Form (NLRB-4767) and send one copy of the form to each of the parties whose names and addresses are listed below. Mailing the notice form to the parties does not relieve you of the obligation to file the appeal itself with the General Counsel and send a copy of the appeal to me by the due date.

Very truly yours,

Regional Director

cc: Charged Party

Other Parties

General Counsel, Office of Appeals